STATE OF MICHIGAN

COURT OF APPEALS

ROGER W. LONG, by and through his mother, guardian, and conservator, JACKLYNNE EVE LONG, Plaintiff-Appellant,	UNPUBLISHED June 14, 2005
v	No. 260113 Oakland Circuit Court
TITAN INSURANCE COMPANY, Defendant-Appellee.	LC No. 03-054025-NF

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiff, as guardian and conservator for her injured son Roger Long, appeals as of right from the trial court's order granting defendant summary disposition under MCR 2.116(C)(7) based on the no-fault act's one-year limitation period, MCL 500.3145(1). We affirm.

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

When reviewing a dismissal on the basis that a claim is barred by the statute of limitations, or any other grounds listed in MCR 2.116(C)(7), this Court accepts all well-pleaded factual allegations as true, unless contradicted by other evidence, and construes them in favor of the nonmoving party. *Maiden, supra* at 119; *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997). The court must consider the affidavits, depositions, admissions, and any other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Maiden, supra* at 119; *Guerra, supra* at 289. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred is an issue of law. *Guerra, supra* at 289.

Section 3145(1) of the no-fault act, MCL 500.3145(1), provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury *may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the*

> *accident* or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

Plaintiff argues that there is a question of material fact whether defendant received notice of Roger Long's accident within the prescribed one-year period. We disagree. Although a witness, Susan St. Pierre, stated in a telephone interview more than two years after the accident that she had spoken to an insurance company representative within a few months after the accident, she did not know what insurance company the agent represented, and there is no evidence that the caller was one of defendant's agent. Indeed, it was most likely a representative of Progressive Insurance Company, Long's motorcycle insurer, given that plaintiff filed a claim with Progressive shortly after the accident. More significantly, there is no evidence that defendant received *written* notice of the accident from anyone. See *Keller v Losinski*, 92 Mich App 468, 471-473; 285 NW2d 334 (1979) (mere oral notice is insufficient). We, therefore, conclude that St. Pierre's telephone statement is insufficient to create a question of material fact concerning whether defendant received written notice of the accident within one year of the accident as required by § 3145.

We also reject plaintiff's argument that the trial court erred in following *Cameron v Auto Club Ins Ass'n*, 263 Mich App 95; 687 NW2d 354 (2004), lv gtd 472 Mich 899 (2005), thus concluding that plaintiff could not rely on the tolling provision in the Revised Judicature Act (RJA), MCL 600.5851(1), which is applicable to persons who are insane. Section 5851(1) provides:

> Except as otherwise provided in subsections (7) and (8),[1] if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

Section 5851 has a long history. In the 1915 Judicature Act, § 5851(1) stated that its savings provision applied to "any of the actions mentioned in this chapter." Accordingly, it "did not apply to statutes that provided their own limitations period." *Cameron*, *supra* at 99. In 1961,

[1] Addressing minor claimants.

the Legislature adopted the RJA, and changed the relevant language of § 5851(1) from "any of the actions mentioned in this chapter" to "any action." *Id*. In *Rawlins v Aetna Casualty & Surety Co*, 92 Mich App 268, 274-277; 284 NW2d 782 (1979), this Court held that, as amended in 1961, § 5851(1) applied to the one-year statute of limitation contained in § 3145 of the no-fault act. See *Cameron*, *supra* at 99-100; *Professional Rehabilitation Assoc v State Farm Mutual Automobile Ins Co*, 228 Mich App 167, 168-169, 174-176; 577 NW2d 909 (1998).

In 1993, the Legislature again amended the relevant language of § 5851(1), changing its scope from "an action" to "an action under this act." *Cameron*, *supra* at 100. The Court in *Cameron* determined that the Legislature intended to restrict the scope of § 5851(1) to only actions brought under the RJA and, therefore, concluded that § 5851(1) no longer applied to actions brought under the no-fault act, which contains its own statute of limitation in § 3145. *Id*. at 100-103.

In *Cameron*, this Court explicitly rejected the argument that "if the Legislature had intended to change the law and make [§ 5851(1)] no longer applicable to no-fault cases, then some record of that intent would appear in the legislative history." *Id*. at 103. This Court noted that our Supreme Court has rejected attempts to contradict the clear language of a statute based on "a judicial theory of legislative befuddlement." *Id*. "Thus, the fact that the legislative history is silent with regard to the potential ramifications stemming from the change . . . plays no part in the proper interpretation of the provision." *Id*. Similarly, we will not speculate based on mere silence in the legislative history that the challenged language was inadvertently or accidentally inserted into the statute.

We are bound to follow the rule of law established in *Cameron*, MCR 7.215(J)(1), and are not persuaded that *Cameron* was decided incorrectly.

Next, we disagree with plaintiff's argument that § 3145 is unconstitutional. Constitutional questions are reviewed de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

As defendant observes, this Court has held that the no-fault act's one-year limitation period advances legitimate government interests and, therefore, does not violate due process. See *Dolson v Assigned Claims Facility*, 83 Mich App 596, 598-600; 269 NW2d 239 (1978). The cases cited by plaintiff do not require a different conclusion.

In *Chase v Sabin*, 445 Mich 190, 195; 516 NW2d 60 (1994), our Supreme Court stated that a statute of limitations "should provide plaintiffs with a reasonable opportunity to commence suit." Thus, where the plaintiff's doctor failed to disclose complications that arose during surgery, the Court applied the discovery rule to extend the plaintiff's time to sue although the literal language of the statute would have barred the action before plaintiff was aware that he had a cause of action. *Id*. at 195-197. In the present case, a police report and the medical records indicate that Long's family was aware from the beginning that a motor vehicle may have been involved in the accident. Additionally, a claim was filed on Long's behalf with Progressive Insurance Company, his motorcycle insurer. Because plaintiff was timely aware that an automobile may have been involved and was able to file a claim with Progressive, she likewise could have filed a claim with defendant. We therefore conclude that, unlike in *Chase*, plaintiff's claim against defendant was not unfairly barred before plaintiff was aware that it existed.

In *Grubaugh v City of St Johns*, 384 Mich 165, 169-177; 180 NW2d 778 (1970), the Supreme Court held that a statute requiring written notice before filing suit against a municipality was violative of procedural due process because it impaired the plaintiff's vested right to sue. Here, however, the statute did not deprive plaintiff of a vested right to sue. It merely required that she either provide notice or file suit within one year. Thus, *Grubaugh* is also inapposite.

This Court has held that "statutes of limitation are to be upheld [against due process challenges] unless it can be demonstrated that their consequences are so harsh and unreasonable that they effectively divest plaintiffs of the access to the courts intended by the grant of a substantive right." *Bissell v Kommareddi*, 202 Mich App 578, 581; 509 NW2d 542 (1993). In the present case, plaintiff had a year to either sue or notify defendant of Long's accident. Additionally, under § 3145, complying with the notice provision would have allowed plaintiff to sue "within 1 year after the most recent allowable expense," although limiting recovery to damages incurred within a year before filing suit. The provisions of the statute are not so harsh and unreasonable as to effectively divest plaintiff of access to the courts. Accordingly, the trial court did not err in finding that § 3145 did not deprive plaintiff of due process.

Lastly, plaintiff argues that the trial court erred in declining to apply the doctrine of equitable tolling. We disagree. Equitable issues are also reviewed de novo. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

In *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 414-417; 684 NW2d 864 (2004), the plaintiff asserted negligence claims against a nursing home arising from the asphyxiation death of a resident who became entangled in her bedding and bedrails. After deciding that some of the plaintiff's claims sounded in medical malpractice, not ordinary negligence, the Supreme Court examined whether the claims were time-barred. See *id*. at 432-433. Although observing that the malpractice claims would ordinarily be time-barred, the Court concluded that "[t]he equities of this case . . . compel a different result." *Id*. at 432. The Court noted that the distinction between negligence and malpractice claims continued to trouble the bench and bar and found that the "[p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights." *Id*. The Court, therefore, concluded that the plaintiff's medical malpractice claims may proceed to trial along with the plaintiff's ordinary negligence claim. *Id*. The Court did not refer to the equitable tolling doctrine by name, or discuss or explain it further.

In the present case, there is no indication that plaintiff's failure to comply with the one-year limitation period was the product of understandable confusion concerning the nature of Long's claim. We, therefore, agree with the trial court that *Bryant* does not provide persuasive authority for allowing equitable tolling of the statute of limitations in this case.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio